

July 6, 2018

By Email (Via Orran Brown, Sr., Esq.)

Special Master Wendell Pritchett, Esq.
Office of the Provost
University of Pennsylvania
3501 Sansom Street
Philadelphia, PA 19104

Dear Special Master Pritchett:

I write in response to Bruce Birenboim's letter, dated June 28, 2018, regarding the role of the Appeals Advisory Panel (AAP) and Appeals Advisory Panel Consultants (AAPC) in appeals of claims.

In its submission, the NFL contends that the Special Master, to whom the Court has directed its authority to hear appeals, should be required to consult with the AAP and/or the AAPC when deciding appeals involving medical issues, particularly where the Qualifying Diagnosis at issue was rendered by a Qualified Monetary Award Fund ("MAF") Physician. We disagree. The NFL's request is contrary to the terms of Settlement Agreement, and more generally the intent and structure of the Settlement Program.

The NFL argues that "[t]he intent of the Settlement Agreement was that the Court (or the Special Master when designated for appeals) would consult with AAPs and AAPCs on medical issues when reviewing claim appeal determinations." See NFL's Letter at pp. 1-2. Simply and directly put, that is not the case. Incredibly absent from the NFL's five-page, single-spaced letter is any reference to the one provision of the Settlement Agreement that specifically addresses the discretion afforded the Court and Special Masters with respect to the AAPs and AAPCs role and involvement in the appeal process.¹ Section 9.8 of the Settlement Agreement, entitled "Review and Decision," provides:

The Court will make a determination based upon a showing by the appellant of clear and convincing evidence. *The Court may be assisted, in its discretion, by any member of the Appeals Advisory Panel and/or an Appeals Advisory Panel Consultant.* The decision of the Court will be final and binding. (Emphasis added).²

¹ In its Order Appointing the Special Masters, the Court expressly contemplated delegating its authority over any appeals to the Special Masters: "With respect to an appeal of a Monetary Award or Derivative Claimant Award determination, an appellant must submit an appeal to the Court. The Court may, in its discretion, refer an appeal to the Master(s). The Court or the Master(s) will decide an appeal of a Monetary Award or Derivative Claimant Award based upon a showing by the appellant of clear and convincing evidence." ECF No. 6871.

² The Rules Governing Appeals of Claim Determinations promulgated by the Special Masters contains virtually identical language; the Rules substitute "Special Master" for "The Court." See Rule 22.

The Settlement Agreement makes clear that the Court (and likewise a Special Master) has the sole discretion to decide if and when consultation with the AAP and/or the AAPC may be appropriate in considering an appeal. That is for good reason.

The Settlement Agreement provides the specific contours of the Appeals Advisory Panel role in the review of Qualifying Diagnoses. Indeed, far from creating a medical-review panel charged with review and confirmation of *all* Qualifying Diagnoses, the parties negotiated and agreed that generalized review by the AAP of Qualifying Diagnoses is confined to specific circumstances, *i.e.*, the review of (a) pre-Effective Date diagnoses rendered in particular time windows or by particular physicians, *see* Settlement Agreement §6.4(a) (“Qualifying Diagnosis Review by Appeals Advisory Panel. A member of the Appeals Advisory Panel must review, as set forth in Section 6.4(b), Qualifying Diagnoses made prior to the Effective Date...”); and (b) the rare post-Effective Date diagnosis rendered through the BAP where the two BAP providers evaluating the Retired Player do not agree on the Qualifying Diagnosis, *see* Settlement Agreement §5.13 (“Conflicting Opinions of Qualified BAP Providers”). Notably, for each such circumstance, the Settlement Agreement provides great detail on the information to be provided to the AAP member, the considerations to be weighed, and the report to be rendered in resolution of the issue. The Settlement Agreement entrusts no broader generalized responsibility to the Appeals Advisory Panel for review of Qualifying Diagnoses.

That is because, for post-Effective Date claims, the Qualified MAF Physicians and BAP Providers—selected by the Claims and BAP Administrators and approved by the NFL and Class Counsel—are entrusted with determining the existence or not of a Qualifying Diagnosis. There is no generalized medical panel cross-check by the AAP on post-Effective Date Qualifying Diagnoses—not in initial review by the Claims Administrator nor more broadly on appeal. For post-Effective Date diagnoses, only a physician selected and approved by the Settlement Program can render a Qualifying Diagnosis. That is the mechanism negotiated by the parties for confirming the existence or not of a Qualifying Diagnosis in post-Effective Date evaluations.

While the NFL’s request for compulsory involvement of AAP and AAPC members in appeals of post-Effective Date Qualifying Diagnoses finds no support in Section 9.8 of the Settlement Agreement, it more broadly misconstrues the nature of review of post-Effective Date claims. The Settlement Agreement, with great clarity, states who is responsible for reviewing particular Qualifying Diagnoses. For the most part, the date of the Qualifying Diagnosis dictates who is responsible for reviewing that Qualifying Diagnosis. Some Qualifying Diagnoses are to be reviewed by the Claims Administrator, while others are to be reviewed by the AAP. Specifically, under the negotiated terms of the Settlement Agreement, the Claims Administrator, as opposed to the AAP, is responsible for reviewing post-Effective Date Qualifying Diagnoses (dated after January 7, 2017), including those Qualifying Diagnoses rendered by BAP Providers and Qualified MAF Physicians. AAPs are only responsible for reviewing pre-Effective Date Qualifying Diagnosis (dated after July 1, 2011 but on or before January 7, 2017).³ That negotiated framework reflects the determination and agreement of the parties that Qualifying Diagnoses rendered by the

³ The Claims Administrator, not the AAP, is responsible for reviewing Qualifying Diagnoses dated on or before July 1, 2011.

party-approved BAP Providers and/or Qualified MAF Physicians are trustworthy.⁴ For that reason, BAP and MAF diagnoses are only subject to *administrative* review by the Claims Administrator. See Settlement Agreement §§ 8.3-8.5, 9.1. Further, the negotiated scope of any appeal of the Claims Administrator's administrative determination of post-Effective Date claims is limited to a party's "good faith belief that the *determination of the Claims Administrator* was incorrect." See Settlement Agreement §§ 9.5 (emphasis added).⁵ Broader challenge to the underlying diagnosis made by a BAP Provider or Qualified MAF Physician by the NFL was not contemplated, and should not be permitted under the Settlement Agreement. For appeals of post-Effective Date Qualifying Diagnoses, it is thus unsurprising that the Special Masters would find no generalized need, in the exercise of their discretion, to seek the input of AAP or AAPC on diagnoses rendered by a Qualified MAF physician or BAP provider.

The NFL's effort to impose medical review by an AAP on each appeal is a re-write of the Settlement Agreement—a re-write that now, post-approval and implementation, would significantly upset the negotiated compromises among the Parties. While the NFL highlights purported deviations in diagnosis by the Qualified MAF physicians and BAP providers that it approved,⁶ it is clear that it is the NFL that is at odds with the medical establishment, having already appealed more than 50% of all Level 1.5 and Level 2 Neurocognitive Impairment claims involving diagnoses rendered by Qualified MAF Physicians.

Of note, the Retired Players the NFL seeks to impact through its proposed re-write of the appeal process are those that did as the Settlement Agreement specifically guided, and obtained their Qualifying Diagnoses through providers selected, approved, and endorsed by the Settlement Program. That is, since these Retired Players had not received a Qualifying Diagnosis before the Effective Date of the Settlement, they went to Qualified BAP Providers or Qualified MAF Physicians to be evaluated, and received their Qualifying Diagnosis by medical providers approved by the NFL. These Players proceeded as guided, and deserve to have the NFL's appeals of their awards handled in accordance with the negotiated terms of the Settlement Agreement.

⁴ Ironically, when the NFL closes its appeals of pre-Effective Date diagnosis claims, most of which have been reviewed by the AAP, one of its standard refrains is that the player has nothing to lose, he can always get a free BAP exam or go through the MAF. In those appeals, the NFL points to the BAP and MAF as trusted sources for Qualifying Diagnoses.

⁵ Section 9.5, entitled "Scope of Appeals," states in full: "The Claims Administrator's determination as to whether a Settlement Class Member is entitled to a Monetary Award or Derivative Claimant Award under this Settlement Agreement, and/or the calculation of the Monetary Award or Derivative Claimant Award, is appealable by the Settlement Class Member, Co-Lead Class Counsel, or the NFL Parties based on their respective good faith belief that the determination by the Claims Administrator was incorrect."

⁶ Despite acknowledging on the first page of its letter that "The appeals process is, of course, not intended to second-guess medical determinations made by qualified physicians . . .", that is exactly what the NFL is doing. While some of NFL's arguments are improperly based on the results of what it admits are only screening tests (e.g., MOCA), most of its "concerns" reflect its disagreement with the Qualified MAF Physicians' application of the "generally consistent" standard, and its related unrelenting (and unfounded) insistence that the diagnostic criteria for Qualifying Diagnoses rendered through the MAF be identical to those required in the BAP.

In conclusion, the NFL's dissatisfaction with the Special Masters' decisions on appeal cannot serve as the basis for the relief sought. The Settlement Agreement neither contemplates nor permits generalized review by the AAP of all post-Effective Date claims on appeal. The NFL's request for a re-write of the Settlement Agreement on this point should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'C. Seeger', written in a cursive style.

Christopher Seeger

cc: The Honorable Anita B. Brody
Special Master Jo-Ann Verrier, Esq.
Brad S. Karp, Esq.
Bruce Birenboim, Esq.